

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**TIMOTHY WILLIAMS,**

**Plaintiff,**

**No. 9:06-cv-936  
(GLS/DEP)**

**v.**

**KENNETH PERLMAN, Superintendent;  
McDANIELS, Assistant Deputy  
Superintendent; Mr. J. MORGAN;  
DONNA B. SERGIO; JOHNSON;  
JOSLYN, TINA PROCOPIO;  
TAMMY BRODT; and CO ZAGBY,**

**Defendants.**

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**APPEARANCES:**

**OF COUNSEL:**

**FOR THE PLAINTIFF:**

Timothy Williams  
*Pro Se*  
326 E. 34<sup>th</sup> Street  
Apt. 2C  
New York, NY 10016

**FOR THE DEFENDANTS:**

HON. ANDREW CUOMO  
New York Attorney General  
615 Erie Boulevard West  
Suite 102  
Syracuse, NY 13204-2455

SENTA B. SIUDA  
Assistant Attorney General

**Gary L. Sharpe**  
**U.S. District Judge**

**MEMORANDUM-DECISION AND ORDER**

**I. Introduction**

The above-captioned matter comes to this court following a Report-Recommendation and Order (“R&R”) by Magistrate Judge David E. Peebles filed February 5, 2009. (Dkt. No. 64.) The R&R<sup>1</sup> recommended that defendants’ motion to dismiss be granted in part and denied in part. Pending are defendant Brodt’s objections to the R&R. (Dkt. No. 65.) For the reasons that follow the R&R is adopted as to all the defendants except Brodt. This court adopts Judge Peebles recommendation that Brodt remain as a defendant, however, alternatively, this court will permit a motion for summary judgment to be filed within thirty days from the filing of this order to resolve the issues of fact surrounding retaliatory conduct by Brodt.

**II. Background**

Timothy Williams, a former New York State prison inmate commenced this civil action pursuant to 42 U.S.C. § 1983, alleging that the

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<sup>1</sup>The Clerk is directed to append the R&R to this decision, and familiarity therewith is presumed.

defendants violated his constitutional rights when they: (1) failed to provide proper footwear and orthopedic inserts, (2) forced him to perform manual labor despite his physical impairment; (3) retaliated against him by issuing a misbehavior report when he grieved their actions; and (4) failed to provide adequate medical care. (See *generally* Compl.; Dkt. No. 1.) On March 14, 2008, following the close of discovery, defendants sought the entry of judgment on the pleadings dismissing the complaint in its entirety. Williams did not oppose the motion.

On February 5, 2009, Judge Peebles recommended dismissal of Williams' complaint for failing to set forth a cognizable civil rights claim, except as to his retaliation cause of action against defendant Brodt. The court now turns to Brodt's objections.

### **III. Standard of Review**

Before entering final judgment, this court routinely reviews all report-recommendations in cases it has referred to a Magistrate Judge. If a party has objected to specific elements of the Magistrate Judge's findings and recommendations, this court reviews those findings and recommendations *de novo*. See *Almonte v. New York State Div. of Parole*, No. 04-cv-484, 2006 WL 149049, at \*6-7 (N.D.N.Y. Jan. 18, 2006). In those cases where

no party has filed an objection, or only a vague or general objection has been filed, this court reviews the findings and recommendations of a Magistrate Judge for clear error. *See id.*

#### **IV. Discussion**

Brodt filed a specific objection to remaining in the case for retaliation. Williams did not object to any portion of the R&R. Thus, with the exception of the retaliation claim against Brodt which this court will review *de novo*, the remaining claims will be reviewed for clear error. Brodt contends that the retaliation claim against her is unclear. The relevant paragraphs from the complaint are as follows:

41. On or about April 15, 2006, plaintiff presented at MCF sick call and complained about his foot and arches. Defendant Bodt without consulting a doctor, podiatrist or taking of any x-rays, defendant Bodt told plaintiff that she was going to put a false report in plaintiff's chart so that he would "stop bothering me."

42. Just thirty (30) minutes after the above-incident, plaintiff falls again at a building front (27 Bldg.) where he must take medication. The construction in the direct front of the non-disability access stairs made it impossible to climb with the plaintiff's foot and ankle injury. Defendant Bodt clearly demonstrated reckless and deliberate indifference to the health and safety of plaintiff.

43. CO Zagby by forcing plaintiff to work manual labor on a verified and recorded disability

demonstrated clear, reckless & deliberate indifference to the health(sic) and safety of the plaintiff.

44. Plaintiff wrote a grievance about the above that was appealed all the way to C.O.R.C.

45. In retaliation to plaintiff's grievance about the actions of defendant Brodt, defendant Brodt wrote a misbehavior regarding the plaintiff. This report charged the plaintiff with (1) Disturbance with loud talking (2) Talking in hallways (loud) (3) Threats (4) Misleading information and (5) Failure to report an injury promptly (see Copy of Misbehavior Report, attached herein as Exhibit #13).

(Compl. ¶¶41-45;Dkt. No. 1.)

Brodt argues that the time frame for the retaliation claim is vague.

The misbehavior report was written on April 13, while the complaint indicates that Brodt threatened to write Williams up on April 15. Since the misbehavior report was filed before Williams filed a grievance against her, Brodt argues that the retaliation claim is not viable. Lastly, Brodt argues that she is entitled to qualified immunity.

Brodt's objections can not be sustained. The complaint is ambiguous in regards to when the grievance was filed. However, since the motion was filed pursuant to Rule 12(c), the court is constrained to resolve any ambiguities, as a matter of law, in favor of the non-moving party.

Simply put, issues of fact remain as to when the misbehavior report

was filed and when a grievance against defendant Brodt was filed. As such, Brodt will remain as a defendant, however, alternatively, this court will permit a motion for summary judgement to be filed within thirty days from the filing of this order to resolve the issues of fact surrounding Williams' retaliatory claim.

Finally, the court has reviewed the remaining claims. Upon review for clear error, the court finds that the R&R correctly concluded that Williams' remaining claims must be dismissed.

**WHEREFORE**, for the foregoing reasons, it is hereby

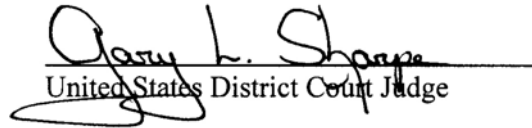
**ORDERED** that Magistrate Judge Peebles' February 5, 2009 Report-Recommendation and Order, except as to Brodt, is adopted and the defendants are dismissed; and it is further

**ORDERED** that Brodt will remain as a defendant, however, alternatively, this court will permit a motion for summary judgement to be filed within thirty days from the filing of this order to resolve the issues of fact surrounding retaliatory conduct by Brodt; and it is further

**ORDERED** that the Clerk provide copies of this Decision and Order to the parties.

**IT IS SO ORDERED.**

Albany, New York  
June 10, 2009

  
United States District Court Judge